

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL
WITH PROOF
OF SERVICE

74-1271

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

ESMERALDO GAZARD COLON,

Appellant,

-against-

UNITED STATES OF AMERICA,

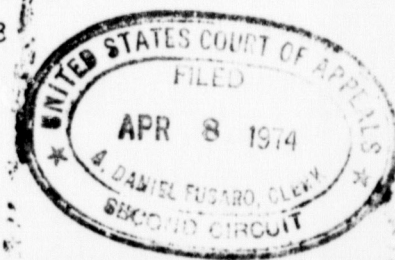
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

ROTHBLATT, ROTHBLATT, SEIJAS & PESKIN
Attorneys for Appellant
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PAUL J. CURRAN
United States Attorney
Attorney for Appellee
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Foley Square
New York, New York



(4099A)

PAGINATION AS IN ORIGINAL COPY

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DOCKET
DISTRICT COURT

DOCKET SHEET

71 CIV. 2631

Jury demand date:

12/26/73

TITLE OF CASE

ATTORNEYS

ALDO C. COLBY

(Petitioner)

-against-

For plaintiff:

ROTHBLATT ROTHBLATT SELIG & PERLIN
232 West End Ave- NYC 10023 (212-7581)

STATE OF AMERICA

(Respondent)

For defendant:

NICK 2631

STATISTICAL RECORD

COSTS

DATE

NAME OR
RECEIPT NO.

REC.

FILE

mailed

Clerk

mailed

Marshal

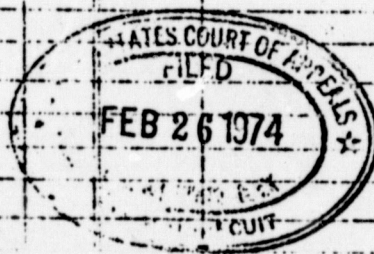
1 Action
IN TO VACATE SENTENCE

Docket fee

Witness fees

Judge sit:

Depositions



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Date: June 1964

Philip A. Mervit, of Asst. U.S. Atty. W. Cullen McDonald in opposition to petitioner's motion.

77 Filed notice of reassignment to Molloy, J. m/n.

3) Receipt of record of proceedings April 25, 1923

Filed Petitioner's notice of appeal from denial of said petition to vacate sentence dated 12-17-73. Answered on docket 12-21-73. Mail copies to:

Paul Garcia, Esq., USA, CENY
Warden, Federal Penitentiary, Atlanta, Ga.
Rosauro Colon

1-8-74 Filed Transcript of Record of Proceedings of 6-12-73
1-8-74 Filed " " " " of 4-5-73
1-10-74 Filed " " " " " " of 6-12-73

1-22-74 Filed ordered - Petitioner's motion to vacate his sentence was denied from the (68CR402) bench at a hearing on 12-17-73. An Opinion will follow in Superior Court. 1/1/74

1-31-74 Filed Opinion # 40305 - In view of Petitioner's inability more than 4 years after his second trial to substantiate his claim that disclosure of the informer's identity would have been relevant to his defense, the Court cannot find that there was any significant denial of Petitioner's right in his Trial which would warrant permitting him to raise now an issue he should have raised at trial and on appeal. So Ordered. Mollay, J. vs/

2-21-74 PETITIONER'S MEMO. OF LAW.
2-21-74 PETITIONER'S MEMO. OF LAW.

2-2-24 PETITIONER'S Memo. OF LAW.

Feb 25-74 Filed amended notice of appeal. Mailed notices to US Atty. & deft.

A TRUE COPY
RAYMOND F. BURCHARDT, 01672

By J. J. Ginn
Deputy Clerk

UNITED STATES OF AMERICA

EMERALDO GAZARD COLON,

Defendant.

United S. D. N. Y. No. 100

NOTICE TO VACATE SENTENCE

Defendant Emerald GAZARD Colon moves to vacate sentence herein and shows:

1. Emerald GAZARD Colon was sentenced on April 22, 1969 to twelve years' imprisonment, as a second offender, following his conviction for receiving and concealing 11.350 grams of heroin in violation of 21 U.S.C. §173 and 177 and is presently serving that sentence at the Federal Penitentiary in Atlanta, Georgia.

2. The United States District Court, Southern District of New York was without jurisdiction to impose such sentence and imposed such sentence in violation of the Constitution of the United States because (1) there was no probable cause for the arrest of defendant; (2) defendant was denied his Sixth Amendment right to confrontation of the witness against him, to wit, an undisclosed informer; (3) perjured testimony was knowingly used in the prosecution of defendant, and was denied effective representation of counsel.

3. This Court should require defendant's production at the hearing on this motion, there being substantial issues of fact as to events in which the defendant participated.

WHEREFORE, defendant moves for an order compelling him for a hearing on this motion and that, after such hearing, the judgment herein be vacated and that he be set free and defendant be granted a new trial.

Respectfully,
Your most obediently,

ONLY COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

AFFIDAVIT

ESMERALDO GAZARD COLON,

Defendant.

STATE OF GEORGIA)
) ss.
FULTON COUNTY)

ESMERALDO GAZARD COLON, being duly sworn, deposes
and says:

1. I am the defendant and the petitioner in
the above entitled proceeding; I make this petition
in support of this application to the Court to declare
as void and vacate and expunge from the records of this
Court, a judgment of conviction entered against me for
receiving and concealing 11.350 grams of heroin in
violation of §§ 173 & 174, Title 21, United States
Code, and to have me produced before this Court for a
full hearing.

2. As a result of this conviction, I was sentenced
to twelve years imprisonment on April 22, 1969 - a
sentence which I am presently serving in the Federal
Penitentiary at Atlanta, Georgia.

3. This application is predicated on the grounds

that the identity of the informer who was most material and essential to my defense was not disclosed. This failure of disclosure in the classical sense violated my right to be confronted by witnesses against me. In the particular sense it permitted, knowingly or otherwise, the Government to use perjured or false testimony in its case against me.

4. The thrust of the Government's case involved the testimony of three of its agents. Two of them, and again in the classical pattern, testified that they saw me furtively glance around before entering my parked car, bend and place something beneath the front seat, enter the car and drive away, closely pursued by them. My arrest shortly ensued.

Two witnesses testified on trial that they saw one of the government agents remove a package from his pocket and place it in my car during the agents' search of my vehicle. The undisclosed informant's testimony would have been most material in substantiating the testimony of these witnesses, - whether his communication to the government agents was to inform them of a sale of narcotics by me or simply to acquaint them of my whereabouts so that they could with some facility "make a case against me".

In the particular or specific sense and within the context of the record, the disclosure of the in-

formant would establish his very existence.

Agent Moser, at about three o'clock in the morning purportedly received a call from the informant. This triggered a call to Agent Miller. The charade then commenced. Twice Moser called Miller and twice he failed to make telephonic contact. Moser who resided in Paramus, New Jersey, approximately six miles from Westwood where Miller lived, called the Westwood Police Department, requesting that a patrolman be dispatched to awaken Miller.

Miller was awakened. His awakening took three different forms, compelled by his inability to hear the ring because he occupied the upper floor and the sole phone was located in his kitchen on the lower floor.

Initially he was aroused because a local patrolman was pounding on the door. (Sup. Hear., p230) This was amended on the first trial to an awakening by his son. (Min.p.82) On the second trial Miller was aroused by his wife who told him that a local patrolman was trying to get in touch with him. (Min. p.114)

The interests of justice require that a hearing be had to determine whether Moser and Miller, trained agents, concocted a tale whose purpose was the ultimate arrest and conviction of myself.

AFFIDAVIT OF COLON

5. On trial the Government agents testified that the undisclosed informer informed that I would be selling narcotics at a certain place. Thier testimony revealed that a quantity of heroin was found in my vehicle. Their testimony was refuted by two witnesses in the partial sense. The presence of the informant would have refuted this falsity completely to the jury's satisfaction if the informer's identity had been disclosed and had he testified.

WHEREFORE I ask that an order be made and entered herein granting a hearing; that I be present at this hearing pursuant to Title 21, U.S.C. §2255; that after such hearing the judgment of conviction and the sentence heretofore entered be vacated and set aside and that I be re-arraigned for all of which no previous application has been made.

/s/ Esmeraldo Gazard Colon

Subscribed and sworn to
before me this 18 day
of May, 1971.

/s/

AFFIDAVIT IN OPPOSITION TO MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
ESMERALDO CAZARD COLON, :

 : Petitioner, :

AFFIDAVIT

-v-

: 71 Civ. 2631

UNITED STATES OF AMERICA, :

: (63 Cr. 402)

 : Respondent. :

----- x
STATE OF NEW YORK)

COUNTY OF NEW YORK)

: ss.:

SOUTHERN DISTRICT OF NEW YORK)

W. CULLEN MAC DONALD, being duly sworn, deposes
and says:

1. I am an Assistant United States Attorney in
the office of Whitney North Seymour, Jr., United States
Attorney for the Southern District of New York, and,
as such, have been assigned responsibility for this matter.

2. This affidavit is submitted in opposition to
petitioner's motion, pursuant to 28 U.S.C. § 2255, to vacate
his sentence and for a new trial on the grounds (1) that
there was no probable cause for his arrest; (2) that he
was denied his right to be confronted with the witnesses
against him; (3) that the Government knowingly employed
perjured testimony at his trial; and (4) he was denied
the effective assistance of counsel.

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AFFIDAVIT IN OPPOSITION TO MOTION

3. Unless otherwise expressly stated, all averments herein are on information and belief.

4. The petitioner collaterally attacks the judgement of conviction entered in the United States District Court for the Southern District of New York, on March 12, 1969, after a three day trial before the Honorable Constance Baker Motley.

5. Indictment 68 Cr. 402, filed on May 2, 1968, charged the petitioner in one count with the unlawful receipt, concealment, and facilitation of the transportation and concealment of 11.350 grams of heroin hydrochloride in violation of Title 21, United States Code, Sections 173 and 174.

6. Horacio L. Quinones, Esq. filed his notice of appearance for defendant on May 3, 1968, with Abraham Solomon, Esq. also being listed as of counsel. Five days later, in a motion dated May 8, 1968, the petitioner moved to suppress the seized narcotics upon the ground that the arresting agents lacked probable cause to have arrested him.

7. Prior to the hearing on said motion, petitioner retained new counsel, Vincent J. Velella, Esq. and Henry K. Chapman, Esq., of counsel who were substituted on August 20, 1968, with the petitioner's written consent.

AFFIDAVIT IN OPPOSITION TO MOTION

3. The hearing on said motion commenced on October 14, 1968, and was concluded on the following day. The transcript of said hearing comprises over two-hundred and fifty (250) pages of testimony and argument. After thorough consideration, petitioner's motion was denied in all respects.

9. Trial commenced on March 10, 1969, and, on March 12, 1969, the jury reached a verdict of guilty. A prior trial, January 7-9, 1969, had also resulted in a jury verdict of guilty, but that was set aside upon a declaration of a mistrial.

10. On April 22, 1969, the petitioner was sentenced, as a second federal narcotics offender, to a term of twelve years.

11. Thereafter, petitioner filed a notice of appeal and moved for bail pending the determination of that appeal which motion was denied.

12. On December 11, 1968, the United States Court of Appeals for the Second Circuit (Lumbard, CJ., Danaher and Anderson, JJ.) affirmed the petitioner's conviction in a per curiam opinion which is reported at 419 F.2d 120.

AFFIDAVIT IN OPPOSITION TO MOTION

13. As summarized in the appellate decision, the petitioner there raised the same two points which he had theretofore raised and lost below, namely:

"... first, that there was a lack of probable cause for his warrantless search; and, second, that the trial court erred in not requiring the Government to reveal the name of the informer." (419 F.2d at 121).

14. On January 9, 1970, the petitioner moved to reduce the sentence imposed which motion was denied.

15. With respect to petitioner's current allegations concerning a lack of probable cause and a denial of his right of confrontation, it need only be noted that these precise allegations have heretofore been thoroughly considered and unanimously rejected. As to these grounds "the files and records of the case conclusively show that the petitioner is entitled to no relief" (28 U.S.C. § 2255).

16. Similarly, petitioner's bare allegation that "perjured testimony was knowingly used" (Petitioner's Motion, para. 2) turns out, upon examination of his affidavit, to be only his speculation concerning (1) the possible non-existence of the same informant who formed the basis of the confrontation claim, or, (2) even if he actually existed, the possibility that his testimony might contradict that of the agents to whom he had supplied

AFFIDAVIT IN OPPOSITION TO MOTION

information. Thus, his petition alleges:

"This failure of disclosure in the classical sense violated my right to be confronted by witnesses against me. In the particular sense it permitted, knowingly or otherwise, the Government to use perjured or false testimony in the case against me." (Petitioner's Affidavit, p. 1, para. 3).

However, petitioner's surmise reveals itself when he later alleges that the informant's testimony might corroborate the agent's testimony, or it might not.

"The undisclosed informant's testimony would be most material in substantiating the testimony of the [agents], - whether his communication to the government agents was to inform them of a sale of narcotics by me or simply to acquaint them of my whereabouts so that they could with some facility 'make a case against me'". (Petitioner's Affidavit, p. 2, para. 4).

The well founded principal that a conviction cannot be based upon perjured testimony, Mooney v. Warden, 294 U.S. 103 (1935), simply has no application where, as here, there is no showing of any evidence to support such a claim. (E.g. United States v. Marcello, 436 F.2d 1221, 1225 (5th Cir.), cert. denied, 401 U.S. 1003 (1971)).

AFFIDAVIT IN OPPOSITION TO MOTION

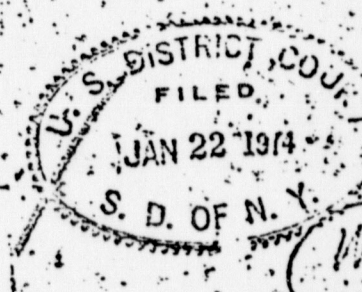
17. As to petitioner's final claim that he was denied the effective representation of counsel, it need only be pointed out that his four retained counsel were not without considerable experience in narcotics trials, that the motions and hearings thereon reflect that skill and experience, and that no particularization of that charge is even attempted by petitioner. It has long been the rule that mere allegations of incompetency of counsel will not ordinarily suffice for the granting of a petition pursuant to 28 U.S.C. § 2255. (United States v. Wight, 176 F.2d 376, 379 (2d Cir.), cert. denied, 338 U.S. 950 (1949)).

WHEREFORE, the Government respectfully requests that petitioner's motion be denied in all respects without any hearing.

W. CULLEN MAC DONALD
Assistant United States Attorney

Sworn to before me this
day of September,
1971.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



ESMERALDO GAZARD COLON,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

71 CIV. 2631

O R D E R

Petitioner's motion to vacate his sentence
(68 CR. 402) pursuant to 28 U.S.C., § 2255 was denied
from the bench after a hearing on December 17, 1973.

An opinion will follow.

Dated: New York, New York

January 21, 1974

SO ORDERED

Constance Baker Motley
CONSTANCE BAKER MOTLEY
U. S. D. J.

Memorandum Opinion and Order

Petitioner was sentenced by this court on April 22, 1969 to twelve years imprisonment as a second narcotics offender. He was convicted, following a jury verdict of guilty, of receiving and concealing 11.350 grams of heroin in violation of 21 U.S.C. § 173 and 174. (68 Cr. 402)

Petitioner's defense at trial was that the heroin was planted in his automobile by an agent for the Bureau of Narcotics and Dangerous Drugs. Petitioner produced two witnesses on his trial who testified that they saw an agent take something from his pocket, bend into the car, and then hand a package to petitioner.

Petitioner's appeal raised two claims: 1) that there was no probable cause for his warrantless arrest and the incidental search and 2) that this court erred in not requiring the Government to reveal the name of the informer at the suppression hearing. The judgment of conviction was affirmed. 419 F.2d 120 (2d Cir. 1969).

Petitioner now seeks to vacate his sentence under 28 U.S.C. § 2255 on four grounds: 1) that there was no probable cause for his arrest; 2) that he was denied his right to confront a witness against him, to wit, an undisclosed informer;

3) that the Government knowingly introduced perjured testimony against him [at his trial]; and 4) that he was denied effective assistance of counsel.

The first ground is foreclosed by the decision of the Court of Appeals and the third ground does not warrant an evidentiary hearing since it is not supported by any evidence, see United States v. Marcello, 436 F.2d 1221 (5th Cir.), cert. denied, 401 U.S. 1003 (1971), other than the allegation that failure of the Government to disclose the informer's identity "permitted. . . the Government to use perjured or false testimony. . . ." (Colon affidavit, May 18, 1973, p. 1, ¶ 3.)

Nor does the fourth ground warrant a hearing. The record demonstrates that petitioner received adequate representation and the instant petition presents no allegations to support petitioner's claim.

At a hearing conducted on April 5, 1973, Colon's counsel asserted that an investigation had indicated certain inconsistencies in the testimony of one of the agents at the trial as to how he was informed in the middle of the night by his partner agent of the fact that petitioner might be in town and in possession of heroin. Counsel argued that this inconsistency suggested that the informer may have been nonexistent.

Petitioner's theory is that if the informer had been produced at trial he might have testified that he had merely told the agents of Colon's whereabouts so they could "make a case against [him]," (Affidavit in Support of Motion to Vacate Sentence, p. 2), or the jury might have been shown that the informer was non-existent. In either event, petitioner claims the jury might have concluded that the agents' testimony was not believable and that the testimony of defendants' witnesses that the heroin package was planted in Colon's car by an agent was more credible.

In Roviaro v. United States, 353 U.S. 53 (1957), the Supreme Court held that "[w]here the disclosure of an informer's identity. . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." Id. at 60-61. "The problem is one of balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." Id. at 62.

The court finds that petitioner's claim that disclosure of the informer's identity would have been relevant to his defense is too speculative to warrant the granting of relief in view of his inability to present any evidence that the informer was non-existent or that the informer might have testified

on behalf of petitioner.

At a hearing conducted on April 5, 1973, petitioner's counsel conceded that he lacked any evidence to support his assertion. ^{1/} The court then allowed petitioner until June 12, 1973 to further investigate the claim. On that date, counsel reported that, because of the passage of time, the investigation had been fruitless. ^{2/} More specifically, petitioner's counsel had sought to determine whether there was, in fact, a telephone in the upstairs bedroom of one of the agents who testified that when his partner agent first tried to reach him in the middle of the night he did not hear the telephone because he was sleeping in the upstairs bedroom where there was no telephone. As a result, the partner agent had to get the local police to go over and knock on the door. Counsel had also sought to determine whether local police records would support this testimony. It was counsel's theory that if the agent was shown to be lying in respect to how he was contacted, it would cast doubt on the credibility of the remainder of the agent's testimony.

Moreover, the Court of Appeals, in affirming Colon's judgment of conviction, held that it was not error for the trial court to refuse to order disclosure of the informer's

MEMORANDUM OPINION AND ORDER

0 . ?

name since "[t]here. . .[was] nothing in the case that has cast the slightest suspicion or doubt on the accuracy of the informer's information, and the agent's own knowledge and observations of Colon substantially confirmed the informer's story." 419 F.2d at 122.

Finally, the speculative nature of petitioner's claim is further supported by his counsel's suggestions that the informer, rather than one of the agents, may have planted the narcotics.^{3/}

In any event, petitioner should have requested disclosure of the informer's identity on the trial and on the appeal from his conviction. During the suppression hearing, the court said to Mr. Chapman, petitioner's counsel:

" . . .I think that in line with the Supreme Court's decision in the Roviaro case the defendant would be entitled to the identity of the informer if he were on trial."

(Tr., Oct. 14, 1968, p. 39).^{4/}

It is unnecessary, however, to decide whether petitioner deliberately by-passed orderly procedures by failing to raise his claim on the trial and on appeal since, in cases of

MEMORANDUM OPINION AND ORDER

alleged violations of constitutional rights at trial," . . .
the maximum scope of § 2255 [is] . . . to allow relief to a
prisoner 'if he has shown . . . a significant denial of a con-
stitutional right, even though he could have raised the point
on appeal and there was no sufficient reason for not doing
so. . . ." United States v. Coke, 404 F.2d 836, 847 (2d Cir.
1968).

In view of petitioner's inability, more than four
years after his second trial, to substantiate his claim that
disclosure of the informer's identity would have been relevant
to his defense, the court cannot find that there was any signi-
ficant denial of petitioner's rights on his trial which would
warrant permitting him to raise now an issue he should have
raised at trial and on appeal.

Dated: New York, New York

January 30, 1974

SO ORDERED

Constance Baker Motley
CONSTANCE BAKER MOTLEY
U. S. D. J.

MEMORANDUM OPINION AND ORDER

FOOTNOTES

1. Tr., April 5, 1973, p. 16.
2. Tr., June 12, 1973, pp. 2-3.
3. Tr., April 5, 1973, p. 7.
This possibility was also suggested by petitioner's counsel during oral argument on December 17, 1973.
4. Petitioner argues that his request that the informer's identity be disclosed on the suppression hearing should have been construed by the court as a request that the identity also be disclosed on the trial. However, in that case, the issue of the relevance of the informer's identity to the question of guilt or innocence should have been raised in the Court of Appeals. "It is hornbook law by now that a section 2255 motion may not be used to relitigate matters not only decided, but which could have been presented on direct appeal. . . ." Williams v. United States, 324 F.Supp. 609, 671 (S.D.N.Y. 1971) (Weinfeld, J.), aff'd 463 F.2d 1183 (2d Cir.), cert. denied, 409 U.S. 967 (1972).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ESMERALDO G. COLON,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

71 Civ. 2631
AMENDED NOTICE OF
APPEAL

PLEASE TAKE NOTICE that the petitioner herein ESMERALDO G. COLON hereby appeals to the United States Court of Appeal for the Second Circuit from the order entered on January 21, 1974, denying the petitioner's motion to vacate sentence. This notice amends the notice previously served herein on December 21, 1973.

DATED: New York, New York
February 1, 1974

Yours, etc.

ROTHBLATT, ROTHBLATT,
SEIJAS & PESKIN
Attorney for Petitioner
232 West End Avenue
New York, New York 10023
(212) 787-7001

TO: Hon. Paul Curran
United States Attorney
Southern District of N.Y.
U.S. Courthouse
Foley Square, New York 10007

Warden
Federal Penitentiary
Box PMB
Atlanta, Georgia 30315

Clerk
Court of Appeals
U.S. Courthouse
Foley Square, New York 10007

Esmeraldo Colon
#93512
Box PMB
Atlanta, Georgia 30315

HEARING TRANSCRIPT

cj

Moser-direct

4 7a

April 23rd I received a phone call from an informant who informed me that Esmeraldo Gazard Colon, alias Henry, had parked his car on Walton Avenue between 182nd Street and 183rd Street in the Bronx.

He further informed me that this individual would be bringing a supply of narcotics into the city sometime in the morning.

THE COURT: Would you try to speak a little less rapidly? I find I am losing some words.

MR. GALVANI: Keep your voice up, too, please.

THE WITNESS: Fine, sir.

Q Had you spoken to this informant before?

A Yes, I had.

Q After you received that phone call, what if anything did you do?

A I then contacted my senior partner, Agent Miller. I informed him of the information I received.

MR. CHAPMAN: I am having difficulty hearing him. I don't know why --

A I then contacted my partner --

HEARING TRANSCRIPT

cj

Moser-direct

5 8a

THE COURT: If you will speak a little louder and a little less rapidly the reporter and the lawyers in the back will be able to hear you.

THE WITNESS: All right.

A (Continuing) I then contacted my partner, Agent Miller. Agent Miller, in turn, contacted our group leader, Mr. Frost, and Agent Pallatroni.

Agent Miller then called me back and told me to arrange a meet with this informant, at which time I called the informant back and we arranged a meet at Fordham Road, off the Major Deegan Expressway in the Bronx.

Agent Miller arrived at my home and we proceeded to Fordham Road in the Bronx where we met the informant.

Q Where do you live?

A Paramus, New Jersey.

Q Does Agent Miller live in New Jersey also?

A Yes, he does, Westwood.

Q So you went to the Bronx?

A That's correct.

HEARING TRANSCRIPT

cj

Moser-cross

42

29a

A No.

Q No?

A No.

Q Did you arrest No. 2 in November of 1967?

A Yes, I did.

Q And that was for sale or possession of narcotics?

A That was for two sales and possession of narcotics.

Q And was that because No. 1 had been the informer which caused No. 2's arrest? Is that what you mean?

A That's correct.

Q So when you talk of an introduction, the No. 1 informer had been the informer against No. 2 informer?

A That's correct.

Q And he became your informer because of the fact that you had placed him under arrest, is that right?

A Yes.

Q And is it true that at the time you placed informer No. 2 under arrest you made him

HEARING TRANSCRIPT

cj

Moser-direct

7 10a

A No, I didn't find anything..

Q Did you have a conversation with him?

A Yes, we did. Agent Miller and I had a conversation with the informant regarding this. He informed us that on April 22nd - that night - 1968, he had observed Esmeraldo Gazard Colon in a 1968 Chevrolet, yellow, with a black vinyl top, parked on Second Avenue by 100th Street.

MR. CHAPMAN: I find I have the same difficulty. He speaks so rapidly that I can't follow him.

A (Continuing) He informed us that he observed Henry parked on Second Avenue by 100 Street in a 1968 Chevrolet, yellow, with a black vinyl top. He informed us that Henry was sitting behind the wheel of the car and alongside of him was an individual who he knew as Nelson. He had observed Henry hand Nelson a package of tinfoil in the car.

Nelson went out of the car and went up into 100th Street, at which time he entered a hallway. Inside of that hallway Nelson opened this package of tinfoil and began distributing heroin, preferably bundles of

you call this?"

Right away he screamed that -- to the crowd -- he turned around to the crowd. He says, "Don't let him do this to me. Don't let me do this to me." He planted it underneath the seat of my car."

Q Was Colon looking at you at the time you found the package?

A No.

Q Where was he looking?

A His back was towards the car. Agent Pallatroni was in front of him, and, as I say, when I found it I said, "Henry, what do you call this?"

When he turned around he looked into the car. He turned around and then yelled at the crowd, yelled to the crowd.

Q Did he see you take it from underneath the seat of the car?

A No.

MR. GALVANI: I have no further questions.

THE COURT: We will take our luncheon recess at this time until 2.15.

(Recess to 2.15 p.m.)

HEARING TRANSCRIPT

cj

Moser-direct.

9 12a

Q So then what else was said in this conversation?

A He then informed us that he heard that Henry would be coming back into the city the following morning with some more narcotics. He then attempted to locate Henry's vehicle. He knew that Henry parked his car at around three or four different locations both in the Bronx and in Manhattan.

MR. CHAPMAN: Is this a conversation or is this this man's assumption from what was said? I don't understand that.

THE WITNESS: This is the conversation.

THE COURT: Conversation. All right.

A (Continuing) At around three a.m. or before three a.m. in the morning of April 23rd he had located Henry's car parked on Walton Avenue between 182nd and 183rd Street, at which time he called me and then I contacted my partner, Agent Miller, who then contacted Mr. Frost and Agent Pallatroni.

Then we were at the place on Fordham Road in the Bronx.

Q During this conversation do you recall

whether he said anything else?

A Yes. He specifically stated also that Henry usually had the narcotics under the front seat of the vehicle.

Q Agent Moser, had this informant given you any information in the past about Henry?

A Yes, he did. On March 14, 1968, he informed me that Henry and his confederate, Nelson, were actively engaged in the illicit narcotic traffic in the vicinity of 100th Street and Second Avenue. He informed me that Henry was residing at 652 St. Mary's Street in the Bronx.

This was a new address because I never, you know, in connection with Henry, knew that he was living or legitimately living in the Bronx, and he informed me that he would keep me apprized of his activities.

Q And later in March did he give you any other information?

A On March 26th he informed me that he had observed approximately 17 bundles of heroin or suspected heroin in Henry's vehicle, in 1968 Chevrolet, which was at the time parked on

Q. Where did you go?

A We followed the informant's vehicle to the vicinity of Walton Avenue and 183rd Street in the Bronx.

Q Did the informant leave the area at that point?

A Yes, he did.

Q What, if anything, did you and Agent Miller do?

A We proceeded down Walton Avenue heading south on Walton Avenue. I mean the vicinity of Walton Avenue between 181st Street and 182nd Street. We observed -- I observed a 1968 Chevrolet, yellow, with a black vinyl top.

Q Where was that Chevrolet parked?

A That was parked on Walton Avenue.

Q Where on Walton Avenue?

A I believe it was on the east side of Walton Avenue.

Q Between what streets?

A Between 182nd and 183rd Street.

Q Did you see anybody else at that location at that time?

A In the vicinity of 182nd Street

I met Agent Pallatroni.

Q Is he another federal narcotics agent?

A Yes, he is.

Q Did you, Agent Miller and Agent Pallatroni have a conversation?

A Yes, we did.

Q After that conversation, what did you do, sir?

A I then, along with Agent Miller, took up a surveillance post on Walton Avenue, northwest corner by 183rd Street.

Q North of 183rd Street on the left-hand side of Walton Avenue?

A Yes, approximately.

Q Approximately what time did you stop there?

A At approximately 5:30, between 5:30 and 5:45 in the morning.

Q Were you able to see the Chevrolet with the black vinyl top where you were parked?

A Yes, we did.

Q Were there other cars on Walton Avenue?

A Yes, sir, there were cars on the east side of Walton Avenue. There were vehicles parked.

Q Did you see any signs along Walton

Avenue which related to the parking of vehicles?

A I recall seeing a sign that stated that there is "No Parking on this Side of the Street." In other words, there is no parking on the east of Walton Avenue between 8 and 11, and I believe it was Tuesdays and Thursdays.

Q What day of the week was April 23rd?

A Tuesday.

Q Did there come a time when some of the cars on the east side of Walton Avenue moved?

A Yes, there did.

Q Now, I want to direct your attention to approximately 10:30 a.m. How many cars were parked between 182nd and 183rd Street on the east side of Walton Avenue at that time?

A There was only one vehicle.

Q Which one was that?

A The 1968 Chevrolet with the black vinyl top.

Q What, if anything, did you see at that time?

A I observed Mr. Colon approach his vehicle. He looked around. He unlocked the door on the driver's side. He placed his right hand in his pocket and

he bent into the car. He was in the car for a few -- a very short period of time. When he came back out of the car he looked around. He then entered in the car, shut the door and proceeded down south on Walton Avenue to 182nd Street.

Q Agent Moser, do you see that person here today?

A Yes, I do.

Q Would you point him out, please?

A It is that gentleman with the red handkerchief in his hand.

MR. GALVANI: Your Honor, may the record reflect the identification by the agent of defendant Colon?

THE COURT: Yes.

Q What, if anything, happened after that?

A We then proceeded to follow the vehicle which had made a left turn on 182nd Street and was proceeding east towards the Grand Concourse.

Q Did you see Agent Pallatroni?

A Yes, I did.

Q Where was he?

A Agent Pallatroni was on 182nd Street right near the corner, 182nd Street and Walton

Avenue.

Q Did you talk to Agent Pallatroni?

A We had radio communication with him.

Both cars were radio equipped, a two-way radio.

Q Were these government owned vehicles?

A Yes, both were government vehicles.

Q What did Agent Pallatroni do?

A Agent Pallatroni took up a surveillance position behind our vehicle heading east on 182nd Street towards the Grand Concourse.

Q What did Mr. Colon do?

A At the Grand Concourse Mr. Colon made a right turn onto the service road of the Grand Concourse.

Q Would you describe what the Grand Concourse looks like, please?

A Well, the Grand Concourse has -- the main part of the Grand Concourse runs both north and south. There are two lanes heading in a southerly direction and two lanes heading in a northerly direction. On either side of these four lanes is a concrete median divider and on this, on the south side there are two lanes heading south and on the other side there are two lanes heading north.

Q By "on the south side" --

A There is a service road heading south.

Q Which side of the Grand Concourse would that be, which direction?

A That would be on the west side.

Q That is what you described as the service road?

A Yes.

Q You testified that Mr. Colon turned right on the service road.

A He made a right turn on the service road, yes.

MR. CHAPMAN: I object to the form of the question, "you testified." The question should be put. The testimony comes from the witness, not from Mr. Galvani.

MR. GALVANI: I said, your Honor --

MR. CHAPMAN: Just one moment.

THE COURT: Just ask him what happened. Proceed.

Q What happened, Agent Moser?

A Mr. Colon made a right turn on the service road on the Grand Concourse heading south. Agent Miller and I made a right turn on the

Grand Concourse, on the main portion of the Grand Concourse heading south, and Agent Pallatroni made a right turn on the Grand Concourse on the service road. He went down the same section of the Grand Concourse that Mr. Colon's vehicle went down.

Q Then what happened?

A Mr. Colon stopped for a traffic light on the Grand Concourse. I can't recall the street he stopped. I believe it was 181st -- it was 181st Street. He stopped for a traffic light at that location. I exited my car, the government vehicle. I approached Mr. Colon's car. I ordered him out. I told him I was a federal narcotics agent and I was arresting him for violation of the federal narcotics laws.

Q Did Mr. Colon get out of the car?

A Yes, he did.

Q Proceed.

A Then, with the assistance of Agent Pallatroni, who at this time arrived, stopped his vehicle behind Mr. Colon's car, I searched and placed Mr. Colon under arrest and handcuffed him in the front. I then advised Mr. Colon of his constitutional rights.

was there anything between the cars?

A A median, if you could call it that, separating the service road from the main thoroughfare of the Grand Concourse.

Q Agent Moser got out of the car?

A Yes.

Q What did you do then?

A I proceeded past the light. Then I waited for traffic to clear on the service road and made a U-turn into the service road going the wrong way.

Q Did you stop your car?

A I did.

Q Where?

A Immediately in front of Mr. Colon's car.

Q Then what did you do?

A I got out of the car and by this time Agent Moser, Agent Pallatroni and Mr. Colon were outside of the car. I approached the car. I had a conversation with the agents and then we proceeded to search the vehicle.

Q Would you take it one step at a time? What was the first thing that was searched?

Q Without looking at the card are you able to say exactly what you said to the defendant at that time?

A Not practically word for word. I'm able to say the main concept involved here, yes.

Q What did you say?

A I advised Mr. Colon that he has the right to remain silent; that anything he says can be used against him in a court of law; that he has a right to have an attorney present if questioned and if he cannot afford an attorney the Court will appoint one for him.

I asked him does he understand these rights and he said yes.

Q What language did he say yes in?

A English.

Q Then what happened?

A At that time I then removed the keys from the vehicle and together with Agent Pallatroni I proceeded to walk Mr. Colon to the rear of the car.

Q Where were the keys?

A The keys were in the car's ignition.

I opened the trunk of the vehicle and gave it a cursory search.

has happened. My ears are very good, My eyesight is poor.

THE COURT: I think you ought to warn him again so that we don't have any problem, and then we'll come on out.

(In open court:)

Q You said you saw Agent Moser read from a card to him?

A Yes, sir.

Q After that what happened?

A I moved Mr. Colon away from the door of the car. Agent took the keys to the car out and we proceeded around the back of the 1968 Chevrolet and agent Moser opened the side door. Mr. Colon was talking to me with his back to the car. In other words, he was looking away from the car and I was looking towards the car. Agent Miller and Agent Moser were searching the car and Agent Miller was on the driver's side of the car and shortly thereafter Agent Miller extended a tinfoil package and said, "What is this?"

Q When that happened which way was Colon looking?

A He was looking towards me, away from the

Q Explain just what you did.

A I opened the trunk of the vehicle.

There were some articles of clothing and a few other miscellaneous articles which I moved aside to see if there was any form of contraband in the trunk of the vehicle.

Q Did you find any contraband?

A No, I did not.

Q Where was Agent Miller at this time?

A At this time Agent Miller had brought the other vehicle around facing Mr. Colon's vehicle. In other words, Mr. Miller was facing north. Mr. Colon's vehicle was facing south on the service road. Mr. Miller got out of his car and came to the rear of Mr. Colon's car.

Q After you looked through the trunk, what, if anything, happened?

A I then, with Agent Pallatroni, walked Mr. Colon to the passenger side of his vehicle and I opened the passenger door, which was locked.

Q Did you see where Agent Miller went?

A Agent Miller went to the other side of Mr. Colon's vehicle, that is, the driver's side.

Q What happened next?

A Agent Pallatroni and Mr. Colon appeared to be engaging in a conversation. I began to search the vehicle from the passenger side. Agent Miller began to search the vehicle from the driver's side. We started from underneath -- started from the front, in other words, on the front floormats working our way back to the front seat and then proceeded to search the rear seat of the car.

Q Did you see anything happen?

A Yes, I did.

Q What?

A I observed Agent Miller retrieve a package from underneath the front seat on the driver's side of the vehicle. It was a tinfoil package.

Q Then what happened?

A Agent Miller removed it. He had it in his hand. He yelled to Henry; he said, "Henry, what is this?"

Mr. Colon said, "It is not mine. You put it there. You put it under the springs. Don't let them do this to me. Don't let them do this to me."

Q Were there any other people in the car?

A There was a large crowd of people that

started to gather and --

Q When you say you were joined, did he aid in the search?

A No, he did not aid in the search, no.

Q All right. What did he do?

A Well, he more or less, I'd say, he was there just to --

MR. CHAPMAN: More or less is very ambiguous, your Honor.

THE COURT: Just tell us what he did.

THE WITNESS: He stood between us and the crowd.

Q You then searched the interior of the vehicle?

A Yes.

Q How did you do that? What happened?

A Well, as I said, I proceeded to the front of the car. I started to search the front of the car by the driver's side. Agent Moser started on the other side.

Q How did you search? Did you get inside of the car?

A Yes, half-way in and half-way out and made a search underneath the mats, ran my hand

across the back of the dashboard and I then placed my hand underneath the front, driver's seat.

Q Did you find anything under the seat?

A I did.

Q What did you find?

A I found a tinfoil package.

Q What did you do when you found that package?

A When I brought it out I extended my arm across the seat. Henry was outside. I'm sorry. Mr. Colon was outside of the car and I said, "What about this? What is this?"

And with that he looked at it and he said, "Don't let them do this to me. Don't let them do this to me. He placed it in the springs."

Q Would you describe what the package looked like?

A I'd say it was in the shape of a very thick, large candy bar, sort of that shape perhaps. I'd say maybe about 3 inches long, perhaps about 2 inches wide and I'd say about an inch thick.

Q What was in it?

A Pardon me?

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car, with his back towards the car.

Q What did he do then?

A He half-turned and looked under his shoulder -- over his shoulder -- excuse me, and said, "That is not mine. You put it under the springs. Don't let them do this to me. Don't let them do this to me. Help, help."

When he said it he said it louder than I'm saying it. He was addressing himself to the people who had gathered in the street.

Q Was there a lot of people?

A I would say there was an excess -- I didn't count. There were enough people in the street.

Q Did you subsequently look inside this package?

A Yes, I did.

Q Would you describe what you saw?

A It contained 99 glassine envelopes and in each envelope there was a quantity of white powder.

Q Did you subsequently put your initials on all of these things?

A Yes, I did.

closed it very fast and then he went back to the front of the car and as he leaned forward, like -- he didn't go actually to sit in the car, he leaned forward and he reached his hand in his pocket, you know.

Q Which hand in what pocket?

A He reached his left hand into his left-hand pocket and he extracted some kind of a package, you know, from his pocket.

Q What did the package look like as far as color is concerned?

A It was wrapped in that silver foil paper, wrapper in silver foil.

Q I show you Government's Exhibit 4 in evidence and ask you whether you are referring to a paper of this type and color.

A Yes, that kind of paper.

Q What did you see him do after he put his hand in his left-hand pocket, his left hand in his left-hand pocket?

A He extracted the package, leaned into the car and -- well, after that I didn't see the package because, like, his hand was in front of him as he reached into the car and when he came back out of the car Mr. Colon started to scream. He started jumping

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back again to the front.

Q What side?

A To my side.

Q Where was that? Was that the driver's side or the passenger side?

A The driver's side, the side facing me.

Q What did you see him do?

A Well, he come running to the car. Then he put his hand in the pocket. He got a package, a small package.

Q What hand did he put in, the right or left hand?

A This hand (indicating).

Q The left hand?

A Yes.

Q Into what pocket?

A In the jacket.

Q Left pocket in the jacket?

A Yes.

Q And then?

A Then he opened the door and he bent, see, like this (indicating), and he come out quickly waving the package. Then I heard this man screaming, yelling like a wildcat, "Don't do that to me. Kill me if you want but don't do that to me. Put nothing in my car," in English and Spanish. I said in English because you don't

know in Spanish. Or do you?

Q Sic transit gloria mundi.

A So, you know, the people start -- when he started yelling, you know, the people start coming toward the car and see what happened.

Q Let me interrupt you at this point. When you saw Mr. Miller stick his left hand in his left pocket, bending into the car, did you see him take anything out of his pocket?

A Yes, a package.

Q What did he take out?

A The same package he was waving like that (indicating).

Q What did you see him take out of his pocket?

A A package.

Q How was it wrapped?

A It was in aluminum.

Q Aluminum?

A Shiny paper.

Q Then what did he do when he came out from the inside of the car with the package? You say he was waving it. What did he say, if you heard him?

A I know he said something but I don't hear exactly what he said.

Spanish newspaper?

MR. CHAPMAN: Whether he reads a Spanish newspaper.

THE COURT: Overruled.

The question is do you read a Spanish newspaper.

THE WITNESS: No, I don't.

Q Did you ever get in touch with an attorney named Horacio Quinones?

A Yes, I did.

Q Tell the Court and jury, please, how you came to get in touch with that gentleman.

MR. GALVANI: Objection. It is irrelevant.

THE COURT: Overruled.

Q Please tell us.

A Well, you know, like, this girl, the girl that I went with in Taft, she is Puerto Rican, you know, so her family reads the paper, you know. A lot of them do.

Q Which paper is that that they read?

A The Diario, I believe it is called.

Q Listen to the question because there are some things that have to be asked directly and answered directly. Was your attention called to an advertise-

A Yes.

Q Do you know what paper it was?

A Yes, Diario.

Q Is that a Spanish language newspaper?

A Spanish.

Q Are there any other Spanish language newspapers
that you read?

A Yes.

Q What is that?

A El Tiempo.

Q But this you say you read in the Diario.

As a result of reading it -- don't tell us what
you read -- did you get in contact with somebody?

A Yes.

Q With whom?

A With Quinones.

Q Who is Quinones?

A A lawyer.

Q Did you speak with him?

A Yes, I speak to him.

Q After you talked to him, what did you do?

A After I talked to him in the office.

Q Did you speak to him on the telephone, Mr. Cruz?

A On the telephone?

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particular time was parked on Walton Avenue between 182nd and 183rd Streets in the Bronx.

Q What did you do then?

A Well, I told Agent Moser to stay where he was and I contacted my superior.

Q Who was that?

A Mr. Frost.

Q What did you do next?

A And also Agent Pallatroni.

I then left my residence and picked up -- no, prior to leaving I called back Agent Moser and I told him to get a-hold of the informant, make a meet.

After that I picked up Agent Moser and we then proceeded to Fordham Road, just off the Major Deegan Expressway in the Bronx.

Q What happened at that location?

AW We met the informant.

Q Was there a conversation with the informant?

A Yes.

Q Do you recall what he said?

A Yes. It was substantially what I just related and also he stated that prior to

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else do at the front of the car?

A I saw him when he opened -- then he used this hand to open the car (indicating).

Q Indicating the right hand?

A Yes, and bend, you know. Then he take something, you know (indicating) --

Q Using the left hand.

A -- like a sandwich or something.

Q Did you see what he took with his right hand from the vicinity of his pocket?

A Yes, a package, a small package.

Q A small package?

A Yes.

Q Did you see how it was wrapped?

A It was -- how you say, something like that paper you put meat in the Frigidaire, aluminum, like silver.

Q What did you see him do with that package wrapped in silver paper?

A Well, he took him out of the pocket right (indicating) --

Q Indicating the lefthand pocket.

A Then he bend in the car.

Q He bent in the car?

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A Then the man start yelling, you know.

Q Who was yelling, which man?

A The guy they got with the handcuffs
in the back.

Q Do you know who he is now?

A Yes, I know him now (indicating).

Q Indicating Mr. Colon.

A Colon, yes. He start yelling like
crazy, like mad.

Q What did he yell?

A "Don't do that to me. Kill me if
you want. Don't do that to me," you know, and
then a lot of people start coming out because
he yelled very loud.

Q Whatelse did he yell besides what
you have just testified to, if you recall?

A That is what he said, "Don't do that
to me. Kill me, you want, but" -- he was
yelling in Spanish and English.

Q What was he yelling in English?

A That "Don't do that to me. Don't do
that to me. Dont put nothing in my car. Don't
put nothing in my car. Kill me, you want."

Q What did he say in Spanish?

the narcotics, that is the case. It doesn't make any difference when he communicated with him or whether he was awake or fast asleep, unless they want to show that Mr. Miller was such a sleepyhead that he wouldn't be capable of doing that.

THE COURT: I will let you ask the questions.

Q Go into a little more detail as to how you came to speak by telephone with Agent Miller.

A I had received a phone call from the informant around three a.m. on the morning of April 23rd regarding the matter in question here. I then attempted to contact Agent Miller by telephone since he lives in Westwood. I live in Paramus. I wasn't able to ~~rouse~~ ~~him~~. I tried twice. The first time I let the phone ring for five minutes. I thought I dialed the incorrect number. I then dialed the correct number. There was no response.

I then called the Westwood police headquarters. I identified myself and asked to have an officer go to Agent Miller's home

and rouse this individual because it was a very important matter. They replied that they would do that.

At approximately 3.40, 3.45 Agent Miller called my home. I related to him the information that I had received, at which time he told me --

Q Don't bother to repeat. But that is the conversation you described yesterday, is that right?

A Yes, that's correct.

Q Agent Moser, was it at my direction that you went up to the Bronx last night?

A Yes.

Q Did you check the physical layout of the Grand Concourse?

A Yes, we did.

Q Would you describe what the Grand Concourse physically looked like at 181st Street?

MR. CHAPMAN: The testimony is that he went up there last night. Let the predicate be established, that the conditions last night were the same conditions as they were in last April. I was there too and I saw a lot of

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W A L T E R B. M I L L E R,

recalled as a witness by the government
in rebuttal, having been previously duly
sworn, testified further as follows:

DIRECT EXAMINATION BY MR. GALVANI:

THE CLERK: You are reminded that you
are still under oath, sir.

Q Agent Miller, yesterday you testified
to the phone conversation with Agent Moser in the
early morning of April 23, 1968.

Would you tell her Honor how you were
awakened on that day?

MR. CHAPMAN: Is it necessary to have
him make the same statement that Mr. Moser made?
It becomes cumulative, your Honor.

MR. GALVANI: If Mr. Chapman wants
to stipulate that he would --

THE COURT: I will allow the question.

Q Go ahead, Agent.

A I was awakened by a pounding on my door
by the local patrolman.

Q And were you told to call Agent Moser?

A Yes. He told me that he had difficulty

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getting me. My phone is located downstairs in my house.

Q It was at that point that you spoke with Agent Moser on the telephone?

A Yes, the first time that day.

Q The first time that morning.

Let me direct your attention to the point of arrest, Agent Miller. Would you describe the physical size of the package which you have testified you found under the seat of the car of the defendant Colon?

A It was about seven, eight inches long and perhaps two and a half inches wide.

Q Agent Miller, did you take that out of your pocket and plant it in the car?

A I did not.

Q Where did you find it?

MR. CHAPMAN: I object. He has told us that. That is improper rebuttal where he is called back to testify, to say whether he planted it, which I doubted he would, and rebut with respect to that. He has already told us where he said he found it.

THE COURT: That is so, Mr. Galvani.

A As a result of a conversation I had with my son I went down to the front door, and I was informed -- rather, I had a conversation with a Westwood patrolman.

As a result of this conversation I called Agent Moser. As a result of that conversation I called my immediate supervisor.

Q Who was that?

A Mr. Frost.

Q Did you call anyone else?

A Yes. Immediately after that telephone conversation I called Agent Pallatroni in New York City, and I called Agent Moser back at his home.

Q After all of these conversations did there come a time when you left your home?

A I did, immediately after the telephone calls.

Q Where did you go?

A To Agent Moser's house.

Q How did you get there?

A By automobile, official Government vehicle.

Q You drove, I take it?

A I drove.

Q Did you pick up Agent Moser?

A I did.

A New York City.

Q I want to direct your attention to April 23, 1968. Were you engaged in the course of your official duties as a federal narcotics agent on that date?

A I was.

Q Were you working here in New York?

A I was.

Q At approximately 3:30 a.m. on that day where were you, sir?

A At my home.

Q And that was where?

A Westwood, New Jersey.

Q What, if anything, happened at about that time?

A Well, shortly thereafter my wife woke me up and told me that a Westwood patrolman was trying to get in touch with me, and I had a conversation with him.

Q Thereafter did you do anything?

A Yes, I made two telephone calls.

Q Whom did you call?

A My immediate supervisor and Agent Pallatroni.

Received ~~a~~ copy of the within
Appendix
this 8 day of April, 1974.

Sign Gordon Siper

For: Paul J. Curran Esq(s).

Att'ys for Appellee

